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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems, as regards amending Annexes III and IV to the Agreement

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems with a view to amending Annex III and IV to the Agreement

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems

The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems ('the Agreement') aims to connect the EU Emissions Trading System (EU ETS) with the Swiss one, by allowing that allowances issued in one system can be traded and used for compliance in the other one, expanding the opportunities for climate change mitigation. The Agreement entered into force on 1 January 2020.

2.2. Joint Committee

The Joint Committee, established by Article 12 of the Agreement, is responsible for administering the Agreement and ensuring its implementation. It can decide to adopt new annexes to the Agreement or amend existing ones. It can also discuss amendments to the Articles of the Agreement, facilitate the exchange of views on the Parties' legislation and conduct reviews of the Agreement.

The Joint Committee is a bilateral body composed by representatives of the Parties (the EU and Switzerland). Decisions taken by the Joint Committee shall be agreed by both Parties.

Article 13(2) of the Agreement provides that the Joint Committee may decide to adopt a new Annex or to amend an existing Annex to this Agreement. Article 8(2) of the Agreement lays down the rules how to handle sensitive information the unauthorised disclosure of which could cause varying degrees of damage or harm to the interests of the Parties to the Agreement including the Member States of the European Union. Such information requires protection against unauthorised disclosure in the security interests of one of the Parties. It bears a sensitive marking assigned by the Parties to protect sensitive information in accordance with the security requirements, the sensitivity levels and the instructions set out in Annexes III and IV respectively.

By means of Security Notice C(2019) 1904 "Marking and handling of sensitive non-classified information", the European Commission introduced new security markings to be used by its services. As a marking is only legally enforceable within the Commission, it recommended setting up appropriate arrangements with third parties outside the Commission in the event that sensitive non-classified information has to be exchanged with them. The Agreement, constituting the Joint Committee and laying down its tasks, provides the necessary and effective framework to this end.

2.3. The envisaged act of the Joint Committee

During its fifth meeting, which will be held in 2022, or earlier by means of the written procedure pursuant to Article 8(4) of the Rules of Procedure of the Joint Committee¹, the Joint Committee is to adopt a decision regarding amending Annexes III and IV to the Agreement ('the envisaged act').

The purpose of the envisaged act is to restore compatibility and consistency between legal rules and their practical application with a view to protecting sensitive information, in particular against unauthorised disclosure or integrity loss. By adopting Security Notice C(2019) 1904, the European Commission changed the security markings of sensitive non-classified information for internal European Commission use.

To this end, Annexes III and IV to the Agreement should be amended to restore compatibility and consistency between legal rules and their practical application and to safeguard and further ensure efficient and effective working arrangements on both sides without entailing the risk of compromised security levels.

The envisaged act will become binding on the parties in accordance with Article 13(2) of the Agreement, which provides: 'The Joint Committee may decide to adopt a new Annex of to amend an existing Annex to this Agreement'. Furthermore and in accordance with Article 12(3) of the Agreement, decisions taken by the Joint Committee in the cases provided for in this Agreement will, upon their entry into force, be binding on the Parties.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The Council Decision based on this proposal from the Commission determines the position of the European Union on the Decision of the Joint Committee to be taken on amending Annexes III and IV to the Agreement.

Article 9(2) of the Agreement lays down the sensitivity levels for sensitive information, which, in accordance with Annex III to the Agreement, the Parties shall make use to identify sensitive information that is handled and exchanged within the Agreement. Annex IV to the Agreement provides the definition of ETS sensitivity levels in terms of confidentiality and integrity rating.

The need to exchange sensitive non-classified information in the framework of the Agreement by means of the direct registry link established by the Agreement requires safeguarding the necessary level of security to minimise the risk of fraud, misuse or criminal activity involving the registries, but also to respond to such incidents and protect the integrity of the registry link as well as the linked markets. To this end, the Agreement lays down the sensitivity levels and provides the relevant rules how to deal with sensitive information under the Agreement. It explicitly defines the security markings to be used under the Agreement, which are identical to those used before adoption of Security Notice C(2019) 1904. Following adoption of Security Notice C(2019) 1904, security markings currently applicable in the European Commission do not correspond anymore to those laid down in the Agreement and should be made compatible again. Security Notice C(2019) 1904 recommended to agree with external partners correspondingly.

¹ Decision No 1/2019 of the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems of 25 January 2019 regarding the adoption of its Rules of Procedure, available from https://ec.europa.eu/clima/system/files/2021-07/20191201_jc_dec_rop_en.pdf and Council Decision (EU) 2018/1279 of 18 September 2018, OJ L 239 of 24.9.2018, p.8.

The development of a well-functioning international carbon market through bottom-up linking of emissions trading systems is a long-term policy goal of the EU and the international community, notably as a means to achieve the climate objectives of the Paris Agreement. In this respect, Article 25 of the Directive establishing the EU's Emissions Trading System (EU ETS) allows for the EU ETS to be linked with other emissions trading systems provided they are mandatory, have an absolute cap on emissions and are compatible, as it is the case with the Swiss system. Following the entry into force of the Agreement on 1 January 2020, the restoring compatibility and consistency bet represents an important step towards the implementation of the Agreement.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing *‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’*

The concept of *‘acts having legal effects’* includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are *‘capable of decisively influencing the content of the legislation adopted by the EU legislature’*².

4.1.2. Application to the present case

The Joint Committee is a body set up by pursuant to Article 12 of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems.

The act which the Joint Committee is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 12(3) of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

² Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.2.2. *Application to the present case*

The main objective and content of the envisaged act relate to environment.

Therefore, the substantive legal basis of the proposed decision is Article 192(1) TFEU.

4.3. **Conclusion**

The legal basis of the proposed decision should be Article 192(1) TFEU, in conjunction with Article 218(9) TFEU.

5. **PUBLICATION OF THE ENVISAGED ACT**

As the act of the Joint Committee will amend Annexes III and IV to the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

Proposal for a

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(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems ('the Agreement') was concluded by the Union by Council Decision (EU) 2018/219³ and entered into force on 1 January 2020.
- (2) Pursuant to Article 12(3) of the Agreement, the Joint Committee may adopt decisions that shall, upon their entry into force, be binding on the Parties.
- (3) In 2022, during its fifth meeting or earlier by means of the written procedure pursuant to Article 8(4) of the Rules of Procedure of the Joint Committee⁴, the Joint Committee is to adopt the Decision on amending Annexes III and IV to the Agreement.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee, as the Decision on amending Annexes III and IV to the Agreement will be binding on the Union.
- (5) It is appropriate to restore compatibility and consistency between legal rules and their practical application with a view to protecting sensitive information, in particular against unauthorised disclosure or integrity loss.

³ OJ L 322, 7.12.2017, p. 3.

⁴ Decision No 1/2019 of the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems of 25 January 2019 regarding the adoption of its Rules of Procedure, available from https://ec.europa.eu/clima/system/files/2021-07/20191201_jc_dec_rop_en.pdf and Council Decision (EU) 2018/1279 of 18 September 2018, OJ L 239 of 24.9.2018, p.8.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the fifth meeting of the Joint Committee or earlier by means of the written procedure pursuant to Article 8(4) of the Rules of Procedure of the Joint Committee⁵, shall be based on the draft act of the Joint Committee attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*

⁵ Decision No 1/2019 of the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems of 25 January 2019 regarding the adoption of its Rules of Procedure, available from https://ec.europa.eu/clima/system/files/2021-07/20191201_jc_dec_rop_en.pdf and Council Decision (EU) 2018/1279 of 18 September 2018, OJ L 239 of 24.9.2018, p.8.